United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2264

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

DENNIS DRUMMOND,

Appellant.

Docket No. 74-2264

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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I

Appellant's position in this case is that dismissal of the indictment is required because of the failure of the Government to comply with Rule 6 of the Plan for Prompt Disposition of Criminal Cases. The Government's response is that dismissal because of court congestion would not serve the public interest.

In support of its argument, the Government looks to the language of Rule 6 and argues that Rule 6 means only that the Government must be ready for trial within ninety days. The

Government compares the applicable Rule 6 of the District Court Plan to the now superceded Rule 6 of the Second Circuit Rules. The old Rule 6 read:

> If the defendant is to be retried following a mistrial, an order for a new trial, or an appeal or collateral attack, the time shall run from the date when the order occasioning the retrial becomes final.

The quoted language implicitly refers to the six-month time period for government readiness -- indeed there is nothing else to which it can refer. Contrast this, however, to the explicit language of the presently effective Rule 6, which states:

> ... such trial shall commence at the earliest practicable time, but in any event not later than ninety days ....
>
> Emphasis added.

Since, under the scheme established by Rule 50(b) this language had to be approved by a reviewing panel consisting of members of the Judicial Council of this Circuit and the Chief Judge of the district or a judge designated by the Chief Judge, the langauge must be assumed to mean what it says.

The Government argues that despite the Rule conditions in the trial calendars of the Eastern District would "almost invariably preclude a retrial within ninety days." However, this record shows that there was not court congestion which precluded timely retrial. Further, the argument can hardly justify delay because the judicial approval needed for the Rules' adoption demonstrates that the judges believed the ninety-day requirement was necessary. In addition, the local rules of the Eastern

District which grant preferences for retrials and provide a procedure for transferring cases from one judge to another when the former cannot hear the retrial because of his own congested trial calendar, obviously anticipated the problem and provided a solution for it. Most obvious, though, in this case the delay was not a mere ninety days -- it was more than one year -- a delay suspicious even under constitutional standards.

The Government also argues that appellant's interpretation of Rule 6 renders it inflexible. To the contrary, Rule 6 provides that the ninety-day period for trial may be extended for good cause. Rule 6 contains built-in flexibility in the same way the excludable periods of Rule 5 provide flexibility for the time periods required in Rule 4. However, when there is no good cause for delaying the trial under Rule 6, dismissal is required just as it is when the Government fails to demonstrate the presence of a Rule 5 excludable period. United States v. McDonough, slip opinion 5615 (2d Cir. October 3, 1974).* What the Government finds uncomfortable here is not inflexibility, but the absence of good cause for the delay.

The Government also argues (Brief at 11) that it had no obligation to prod the court into trying or transferring this case because its only obligation was to be ready for trial.

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*The delay in McDonough, defined as de minimis, did not justify delay without being excludable. The one-year delay here can hardly be described as de minimis.

However, the Rule 2 reporting requirements eliminate this line of argument. The required reports to the Chief Judge and the Circuit Executive are not the ex parte reports the Government eschews.* (United States v. Pierro, 478 F.2d 386 (2d Cir. 1973)), although involving the filing of a notice of readiness, make clear that the Government's responsibility is to keep the court aware of the status of pending cases.

II

The Government responds to appellant's position that evidence of the Febraury 3 transaction was improperly admitted with a bit of transparent Lewis Carroll fantasy. Its argument is that because the Government proved appellant's participation in the February 10 transaction, the similarity of mode of operation used in the February 3 transaction establishes his participation in that transaction as well, and that the February 3 transaction and the events surrounding it can be used to prove his involvement in the February 10 transaction. However, unless the Government proved not only that there was a transaction on February 3, but also that appellant participated in it, the February 3 transaction could not be evidence of appellant's guilt of any crime alleged to have occurred on February 10.

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*Chief Judge Bazelon's concurring statement in United States v. West, D.C. Cir. Doc. No. 73-1665 (September 11, 1974), emphasizes the necessity of reporting requirements to keep court calendars current.

United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970); Jefferson v. United States, 309 F.2d 380 (9th Cir. 1962); Ford v. United States, 210 F.2d 313, 317-318 (5th Cir. 1954). Accordingly, since similarity of method goes only to the fact that someone, in this case Day, was involved in both crimes, it does not prove appellant's involvement in the events of Febraury 3. Further, the presence of a car appellant did not own but was seen driving a week later cannot be proof beyond a reasonable doubt of his participation in the events of February 3 when even the presence of a person at the scene of a crime, without more, does not prove his guilt beyond a reasonable doubt (United States v. DiRe, 332 U.S. 481 (1948); United States v. Kearse, 444 F.2d 62 (2d Cir. 1971); United States v. Cantone, 426 F.2d 902, 904 (2d Cir. 1970); United States v. Minieri, 303 F.2d 550, 556-557 (2d Cir. 1962); see United States v. Romano, 382 U.S. 1 136, 141 (1965)).

The Government's bootstraps have holes: appellant's participation, knowledge, and intent on February 10 can be proved by events which transpired on February 3 only if the Government proves he was involved on February 3. But proof of involvement on February 10 is not, simply of itself, evidence of participation on February 3.

The cases cited by the Government are inapposite. In United States v. Stadter, 336 F.2d 326 (2d Cir. 1964), there was no question as to the defendant's participation in the prior acts. In United States v. Miller, 478 F.2d 1315 (2d Cir. 1973),

the prosecutor tried in his cross-examination of the defendant to discredit his assertions as to the scope of his association with other members of the robbery team. The prosecutor tried to show he was an active member of the group. Then, in summation, the prosecutor argued that the testimony of the co-conspirator convicted the others, and should convict this defendant. This Court, while stating that the summation was close to the line, sustained the conviction because the defendant opened the door to the cross examination by his testimony, and to the summation by attacking the credibility of the accomplice.

The Government argues it could introduce evidence of the February 3 transaction to negate appellant's defense that he was not present on February 10 and that he got the marked bills at a gambling game at a special club. This issue is fully dealt with in appellant's main brief.

CONCLUSION

For the reasons set forth above and the reasons set forth in appellant's main brief, the judgment should be reversed and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

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December 31, 1974

Certificate of Service

December 31, 1974

I certify that a copy of this reply brief for appellant has been mailed to the United States Attorney for the Eastern District of New York.